SUBJECT INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
Witnesses of Unimpeachable Honesty	5
The Government's Felonious Witnesses	8
REASONS FOR ALLOWING THE WRIT	15
CONCLUSION	24
APPENDIX A—THE JUDGMENT	25
APPENDIX B—STATUTES INVOLVED	25

LIST OF AUTHORITIES

CASES

Anderson v. U. S., 124 S.W. 2d 58, 66, 6 C.A.	19
Baumgartner v. U. S., 322 U.S. 665, 670	23
Beeler v. U. S., 205 F. 2d 454, 455-456	21
Bloch v. U. S., 221 F. 2d 786, 790 (9 C.A.)	17
Boyd v. U. S., 142 U.S. 450, 458	17
C.M. & St. P. Ry. v. Coogan, 271 U.S. 472, 477-478	24
DeLuca v. U. S., 298 F. 412 (C.A. 5)	21
Fletcher v. U. S., 158 F. 2d 321, D.C. Cir.	19
Flower v. U. S., 116 F. 241, 5 C.A.	19
Glasser v. U. S., 315 U.S. 60	20
Hartzell v. U. S., 322 U.S. 680, 687	23
Helton v. U. S., 221 F. 2d 338	18
Holmgren v. U. S., 217 U.S. 509	19
Kassin v. U. S., 87 F. 2d 183, 184 (C.A. 5)	3, 21
Keegan v. U. S., 325 U.S. 478	22
Klapprott v. U. S., 335 U.S. 601, 612	23
Krulewitch v. U. S., 336 U.S. 440, 445-458	22
Looney v. Metropolitan R.R. Co., 200 U.S. 480-488	24
Lott v. U. S., 218 F. 2d 338	18
Manning v. Ins. Co., 100 U.S. 693, 698	24
Nye & Nissen v. U. S., 336 U.S. 673, 625-626	22

CASES	PAGE
Paddock v. U. S., 79 F. 2d 872 (CA 9)	21
Railton v. U. S., 127 F. 2d 691	18
Rivera v. U. S., 57 F. 2d 816, 822, (C.A. 1)	23
Shepard v. U. S., 290 U.S. 96, 100	24
Simmons v. U. S., 75 S. Ct. 397, 401-402	17
Stansbury v. U. S., 219 F. 2d 165	18
Stone v. U. S., 223 F. 2d 23, 25	19
U. S. v. Crimmins, 123 F. 2d 271 (C.A. 2)	21
U. S. v. Di Re, 332 U.S. 581	21
U. S. v. Falcone, 311 U.S. 205, 210-211	20, 22
U. S. v. Holton, 222 F. 2d 840 (C.A. 7)	21
U. S. v. Markman, 193 F. 2d 574 (C.A. 2)	21
U. S. v. Simone, 205 F. 2d 480	21
U. S. v. Spagnuolo, 168 F. 2d 768	21
Wright v. U. S., 227 F. 2d 855 (C.A. 8)	21

TEXTS	
Menninger, The Human Mind, 148, 3d Ed., 1949	19
2 Wigmore, Evidence, Sec. 500, 3d Ed., 1940	19
2 Wigmore, Evidence, Sec. 934, 3d Ed., 1940	19
3 Wigmore, Evidence, Sec. 967, 3d Ed., 1940	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No._____

SIDNEY SMITH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sidney Smith, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (R. 1058), affirming the conviction of Petitioner.

Opinion Below

The opinion of the Court of Appeals (R. 1052-57) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals is dated, and was entered on June 30, 1955 (R. 1058). It appears at the end of this Petition as Appendix A. Petition for Rehearing was denied on August 12, 1955 (R. 1067). Jurisdiction of this Court is invoked under 28 U. S. C., 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

1. Whether there was a lawful verdict where the trial court permitted, over timely objections and motions for acquittal, the Government to introduce evidence of distinct and different crimes *not* alleged in the indictment and *no* notice given Petitioner of such extraneous evidence prior to trial, in contravention of the due process clause.

2. Whether conviction can be sustained where there is, apart from statements of accomplices (described by the court below as "*incorrigible criminals*", R. 1052), people "*of the most unsavory sort*" (R. 1053) made after the date of the acts charged as crimes, *no proof* of the corpus delicti.

3. Whether statements made after the date of the acts charged in the indictment are to be treated as competent testimony under the circumstances of this cause that, in the absence of corroboration, they are *not* admissible to establish guilt.

4. Whether conviction can be sustained where there is, apart from statements of drug addicts, confessed perjurers, accomplices, absent any corroboration, *no evidence* that Petitioner was a party to any combination or agreement between co-conspirators *(not indicted)* or that Petitioner

was a knowing participant in any common and unlawful design. Further, may conviction be sustained where the circumstantial evidence is wholly insufficient in that it does not exclude to a moral certainty *(Kassin v. United States,* 87 F. 2d 183, 184—C.A. 5) every reasonable hypothesis of innocence.

Statutes Involved

The pertinent statutes involved are set forth in Appendix B, *infra,* pp. 25-28.

Statement

Petitioner, Sidney Smith, was charged, in an indictment (R. 6-16) containing seven substantive counts, a conspiracy count (thirty overt acts) with violating Tit. 18, *U. S. C.,* Secs. 494 and 1001 (forging prescriptions) and Tit. 26, Secs. 2553 and 2554(a) (possession; bartering of narcotics absent a form issued by proper authority). Carl E. Lawder and Charles (Red) Aarons were named as co-conspirators *but were not indicted* (R. 6). The purpose of joining these persons was to procure their testimony.[1] Trial

[1] The Houston Chronicle, Monday, November 29, 1954.

"Dope Witness Freed, Says 'Deal' Made

Charles H. (Red) Aaron, one of the principal witnesses against ex-cop Sidney Smith and indicted along with Smith on narcotics charges, was released Monday. All charges against him were dropped.

Aaron was released from the Montgomery County jail in Conroe, where he has been held for the past several weeks.

He was released by the U. S. marshal's office on orders of United States Commissioner Ralph Fowler.

"I made a deal with the U. S. attorney's office," a well known lawyer said Aaron told him. The lawyer said he ran into Aaron soon after his release.

The lawyer quoted Aaron as saying the U. S. attorney had "promised light treatment if I played ball with them."

before the Court resulted in conviction on all counts. The period of the conspiracy embraced *June 14, 1953 to August 17, 1953*. Count 1 of the Indictment in substance charged that Petitioner transported Lawder to the office of certain physicians for the purpose of obtaining prescriptions for narcotic drugs, and then transported him to drug stores where the prescriptions were filled. Count 2 charged Petitioner with supplying this co-conspirator with money with which to have prescriptions from physicians filled at various drug stores. Count 3 charged that Lawder presented himself to various physicians in Houston, Texas, on the pretext that his wife (described by a fictitious name) was suffering from cancer, and thus obtained prescriptions for dilaudid. Count 4 charged that this co-conspirator gave false names and addresses of himself and his purported wife to such physicians from whom he obtained prescriptions. Count 5 charged that Petitioner took a portion of the dilaudid so obtained from co-conspirator Lawder, and that co-conspirator Aarons likewise received a portion of such contraband. Count 6 charged that Petitioner "gave portions of the dilaudid to the certain drug addict or addicts". Count

---

Aaron could not be reached.

He was freed on recommendation of Asst. U. S. Dist. Atty. Carlos Watson, Jr.

Watson said Aaron was freed because testimony he gave in the Smith case related to "circumstances and facts concerning himself. To use this information against him would have been unfair and I'm not sure, but I think it would have been illegal."

Watson denied that the district attorney's office had made a "deal" through which it promised Aaron freedom in return for testimony against Smith. He also denied reports that he had promised to "go light" on prosecution of Aaron in return for his testimony."

(The "lawyer" mentioned above is **not** representing Petitioner).

7 charged that Petitioner administered a portion of this dilaudid to "a certain addict, and assisted the said addict in taking injections of the narcotic drug dilaudid". *(Petitioner filed a Motion for Bill of Particulars as to Counts 6 and 7*—R. 19-21—*which was overruled)*. The "addicts" involved in this conspiracy were *not* named in the Indictment, but were later revealed to be two prostitutes and a yardman (R. 197, 736).

Timely Motions for Judgment of Not Guilty were denied (R. 265-268; 1038-1043).

The evidence adduced *by the Government* may be divided into two clear-cut groups:

I. Witnesses of Unimpeachable Honesty; and,
II. Felonious Witnesses.

I. WITNESSES OF UNIMPEACHABLE HONESTY

1. *Miss Alma Gregor,* manager of a store next to the pharmacy where Lawder bought narcotics on illegal prescriptions, identified Lawder and Aaron as the men who came to the pharmacy (R. 42). But she *did not identify Petitioner* as being with them (R. 44, 46, 47-48).

2. *Dr. W. M. Pratt,* the physician who gave Lawder the prescription, *did not identify Petitioner* as ever having accompanied Lawder (R. 66).

3. *Norman John Daigle,* a university student who worked next door to the pharmacy where Lawder bought narcotics, *did not identify Petitioner* as ever having been near his place of occupation (R. 169).

4. *Dr. Joseph Lee Dargan,* a physician who gave narcotics prescriptions to Lawder, *did not identify Petitioner* as ever having been with Lawder (R. 177-178).

5. *Earl W. Mitchell,* pharmacist who sold narcotics to Lawder, *did not identify Petitioner* as ever having been with Lawder (R. 179-186).

6. *Herbert F. Schultz,* a pharmacist who sold narcotics to Charles Aaron, *did not identify Petitioner* as ever having been with Aaron (R. 193).

7. *Dr. V. I. Baugh,* a physician who gave prescriptions for narcotics to Lawder, *did not identify Petitioner* as ever having been with Lawder (R. 226-232).

8. *James H. Fisher,* a pharmacist who sold narcotics to Lawder, *did not identify Petitioner* as ever having been with Lawder (R. 241-247).

9. *Clifton L. Mackey,* a druggist of Luling, Texas, identified Lawder as having bought potassium cyanide from his drug store, *but did not identify Petitioner* as having been with Lawder (R. 665).

10. *Horace Cook,* professional Bondsman, *did not even mention Petitioner* or connect him with any act of any kind, legal or illegal (R. 48-50).

11. *Neal Matthews* and *Vance Newman* (respectively Deputy U. S. Marshal and U. S. narcotics agent) merely gave technical testimony *without reference to Petitioner* (R. 50-51 and R. 259-269).

12. *Police Chief J. F. Heard* testified to some minor regulations of the Houston Police Department,

and about some infringement of these regulations by Petitioner in using a police car without permission; but he *said not one word concerning the alleged conspiracy of Petitioner and Lawder* (R. 628-641).

13. *Sidney Hughes*, Director of Civil Service, City of Houston, testified to the same infraction of regulations mentioned by Police Chief Heard, but *said not one word concerning the alleged conspiracy of Petitioner and Lawder* (R. 644-658).

14. *Captain Cecil Priest*, of the Houston Police Department. testified to the same infraction of police regulations mentioned before, but *said not one word concerning the alleged conspiracy of Petitioner and Lawder* (R. 701-707).

15. *Tom Taylor, Edgar Elliott, T. D. Mason, A. B. Marshall, Margaret Scott, L. C. Robinson*, and *Alvin Johnson* (all employees in the paymaster's office or in the Police Department of the City of Houston), and *Paul W. Hanson* (handwriting expert), testified to the fact that Lawder fraudulently cashed checks stolen from the Police Department of Houston. But *none of them said one word concerning the alleged conspiracy for which Petitioner was indicted* (R. 687-701, 715-731, 747-808).

16. *Mrs. Christine Lawder*, wife of Carl Lawder, testified that she had one time been in the home of Petitioner and his wife, and one time had happened on Petitioner and his wife at a drive-in, and had drunk beer with them; furthermore, she had some notes in Petitioner's handwriting which

she said her husband had given her. But *she said not one word concerning the alleged conspiracy for which Petitioner was indicted* (R. 616-628).

17. *George H. White*, U. S. Narcotics Agent, testified he found some scribbled notes, in Petitioner's handwriting, in the home of Hazel and Earl Voice. But *he said not one word concerning the alleged conspiracy for which Petitioner was indicted* (R. 707-713).

II. THE GOVERNMENT'S FELONIOUS WITNESSES

It was established that, without exception, every person whose testimony actually criminated Petitioner, was a *convicted felon* and (if the conspiracy existed at all) a *co-conspirator:*

1. *Carl Lawder.* Lawder, the principal Government witness, was a convict in the Federal Penitentiary at Leavenworth (R. 67). By his own admission and the evidence of others, he was shown to be *a confirmed liar.* To get prescriptions for narcotics from Dr. Pratt, he called himself "Mr. Hayes", and told a pitiful tale about the sufferings of his wife from incurable cancer (R. 60-61, 65, 75). He told Dr. Dargan the same story, with elaborate embellishments (R. 172-173). To get potassium cyanide, he told the druggist, Mackey, that his name was Williams, that he lived in Waelder, and that he was getting the cyanide to kill dogs (R. 661). He told the druggist Watkins that his name was *Franklin*, and got prescriptions illegally on the pretext that his wife was sick of cancer (R. 842). He had obtained narcotics from several doctors in San Antonio by using the same type of *lies* (R. 100, 103). He lied when he said that his wife had cancer

(R. 105, 608).. He declared that he had never been a police informer (R. 591, 605-606); yet *a Houston police officer identified him positively as* "a well-known informer" (R. 1031). He was sentenced to prison for *mail fraud* (R. 114), and by his own admission had, for years, made a practice of *forging checks* (R. 130). By the Government's own proving, he forged signatures to two checks that he, or someone else, had stolen from the Houston Police Department (R. 747-798; 801-806). He had been a drug addict since *1945* (R. 104), and had been *sentenced to prison three times on narcotics charges* (R. 113-114).

2. *Charles Aaron.*[2] This was a principal witness whom the Government used chiefly to confirm the testimony of his alleged co-conspirators, *his friend*, and *his brother-in-law* (R. 105). It was shown that he had been previously convicted three times in federal courts (R. 142) and twice in state courts (R. 164) for violations of narcotics laws. He had been a drug addict since 1942 at least (R. 164). At the time of this trial, he was in jail under Federal indictment (R. 153-164). *Even on the witness stand* he showed himself a *constitutional liar* incapable of telling the truth. When asked if he had made statements to anyone regarding the *Smith* case, he said, "I made one to Chief L. D. Morrison and I made one to C. C. Devine" (R. 143). A few minutes later he said that his statement "might have been" made to Devine; "but I don't recall" (R. 146). He was then confronted with a statement which

[2] "Mr. White (Federal Narcotics Officer and witness for the Government) called Aaron a 'pathological liar', and added, 'I would not have him as my witness and I wouldn't send anyone to the pen on his word'." (The Houston Press, Thursday, July 22, 1954).

he admitted was signed by himself (R. 148), that had been made to C. C. Devine; whereupon he declared, "It is definitely not my statement" (R. 154). He testified that he had made no statement to any federal officer other than the U. S. District Attorney's office (R. 146); but a few minutes later he testified that he had made a statement read to him by the federal narcotics agent, George White, and signed it at the request of George White (R. 161).

3. *Marguerite Fredericks.* This person was one of the Government's principal witnesses. The Government sought to show that Petitioner used the narcotics (allegedly procured through Lawder) in order to buy the sexual favors of this woman (R. 197). This woman was shown to be a notorious prostitute (R. 301, 305, 328, 335, 336), keeper of an open saloon (R. 335), wife of a felon (R. 335), who had been arrested many times for narcotics violations, for plying her prostitute's profession in Houston, for vagrancy, and for "drunk and disorderly" conduct (R. 326, 333, 335, 337). By her own confession, she was heavily addicted to narcotics (R. 200). She said that she was so much under the influence of drugs that *she could not even remember whether she had sexual relations with Petitioner at Earl Voice's house* (as charged by the Government) —"because I was using so much dope" (R. 203). At the time, she was using dilaudid, heroin, and cocaine! (R. 205); and in a single night she took *38 tablets of dilaudid!* (R. 207). She said that she was in a complete state of confusion during the time of the alleged conspiracy (R. 222). She was sentenced to the federal penitentiary on a narcotics charge, and was a convict at the time of this trial (R. 213, 219-220).

By her own admission, she was a *liar*. She first told federal investigators that she knew nothing about the case (R. 213), but later on she appeared and testified against Petitioner. Before a federal Judge the year previously, she said that she was *not* a narcotics addict, yet examination showed that she had been taking injections of dope very recently (R. 303). She stated, "I was mad about being brought back because I was due for parole" (R. 224). A jail-mate, Geraldine Pierce, of hers said that Mrs. Fredericks discussed the matter of getting a parole (R. 283-284), and said that, after testifying in the present case, she would be paroled (R. 286). This same Geraldine Pierce testified that Mrs. Fredericks said she was going to tell "the federal authorities of a love affair with Petitioner . . . to keep from telling them more or other things (R. 287); and also that Mrs. Fredericks had said "she was more or less forced to testify" on account of her longed-for parole (R. 289); and also that Mrs. Fredericks had the impression "that her testimony in this case would help her get a parole" (R. 295).

4. *Mrs. Joan McMillian*, another jail-mate of Mrs. Fredericks, testified that Mrs. Fredericks had said to the federal agents who questioned her about Petitioner's case that "she put a story on them" (R. 312); and that the federal agent who questioned her had "told her if she would come to court and testify to that, what she told him, that he would be able to help her with her parole" (R. 313). She confirmed what Mrs. Geraldine Pierce had said—namely, that Mrs. Fredericks had "said that she did rib them (federal agents) that she and Petitioner had a big love affair" (R. 314), and that "they had promised a parole by Christmas" (R. 319, 320).

5. *Earl Voice.* This witness testified to Petitioner's spending the night with Marguerite Fredericks in his house (R. 234), and whom the Government tried to show was a bosom friend of his. By his own admission, "I have been convicted of murder and robbery out of Jefferson County" (R. 236). He had been convicted, on a plea of guilty, of a violation of federal narcotics law (R. 308); his wife had likewise been convicted (R. 236)—and Petitioner had made the case against both of them (R. 236). When Petitioner made this case against Voice, the latter's place was raided, the doors kicked down by the police; the officers found "what we thought was narcotics" as well as "stolen materials, such as clothes, irons, radios, and things of that nature" (R. 340). At the time of the trial, Voice was lodged in the federal jail with narcotic charges pending against him (R. 327-328).

6. *Opal Jackson.* This witness testified that Petitioner had sexual relations with her, and paid her in narcotics (R. 736). She admitted that *she lied* in making a statement a few days previously (R. 743) about the case. She had served three years in prison for burglary, and thirty days for misdemeanor theft (R. 745-746). Her husband had been convicted of burglary (R. 869), *and was waiting trial on new burglary and felony theft charges* (R. 868).

7. *Gus Thomas.* This man, a former yardman for Petitioner, had been sentenced to 20 years in prison for burglary and theft (R. 821); he had been a narcotics addict (R. 809), and had been convicted of forgery (R. 810). He *refused* to answer the question whether he was a *professional informer* (R. 838); but did yardwork for about a dozen different police officers

(federal and state) (R. 820-821). He said that Petitioner had regularly given him narcotics tablets while he worked as a yardman for Petitioner (R. 810-811), and that the only pay he got was one dollar on three occasions (R. 817). Petitioner's wife, on the other hand, testified *she paid him up to $4.00 for mowing her lawn* (R. 505, 846-847), *gave him meals* (R. 506, 847), *and gave him clothes* (R. 846-847).

Thomas said that on one occasion, in July of 1953, he accompanied Petitioner on a fishing trip during the latter's vacation (R. 813). Here, he said, while the two of them were in a boat on the water, Petitioner gave him narcotics tablets, and he "cooked them up in a spoon" (R. 813), and took them (by injection). This was done in spite of the fact that he said that "the water was a little rough out there," and "the boat was doing this way and gilly-gallying in the water" so that everyone's hand was unsteady (R. 812-813). Petitioner's wife testified that her husband's vacation period was *not* in July, as said by Thomas, but from August 20 to September 8 (R. 849).

Petitioner took the stand and categorically denied the charges in the Indictment. The proof shows that Petitioner, being a detective on the Narcotics Squad of the Houston Police Department, and working in close conjunction with Federal Narcotic Officers (R. 391-393; 420; 447-450), used informers continually in making cases, and was continually thrown into the company of prostitutes and underworld character.

Petitioner was shown to have been on the Houston Police Force six years (R. 343) and he was officially rated as of "very good" (Exhibits 18 and 19—R. 634-643) standing

on the Force (R. 863). He has a wife and two small children (R. 353). Numerous witnesses from the Houston Police Force and from among Federal Agents testified to his good character and high reputation (R. 538-540; 546-549; 555-565; 572-577; 325-333; 334-340). Petitioner denied association with each and all of the Government witnesses, except on the basis of Narcotic Agent-informer relation.

W. H. Crook, who had spent twenty-eight years as a Federal Narcotics Officer, and retired with a pension and in good repute (R. 556), testified: "Practically all of them (narcotics officers) that I have known have used them (informers)" (R. 558). He testified that an officer could not "normally make a case without the use and employment of an informer" (R. 559). He agreed that to use informers, the officer must "on your own volition just go out and go ahead and get into them and *hang around their habitats and get acquainted with them*" (R. 559).

Petitioner unsuccessfully objected to all references and testimonies offered by the Government seeking to establish that Petitioner had carnal knowledge of these prostitutes and informers; that he signed and cashed checks stolen from the Houston Police Department; that he bought potassium cyanide in Luling, Texas (R. 606-607; 658-669); that notes in Petitioner's handwriting, constituted plans for a robbery to be committed by Petitioner and co-conspirator Lawder (R. 601-602); that his association with Earl and Hazel Voice was naught but dealings with Voice as an informer.

The trial court convicted Petitioner and sentenced him to three years in the Federal Penitentiary at Atlanta, Georgia.

The judgment of the Court below affirmed the trial court's verdict (R. 1058).

Reasons For Allowing The Writ

This litigation brings into being highly significant (somewhat disturbing in nature) issues of criminal law that deserves examination by this Court.

First, the record reflects illegal admission of evidence relevant offenses *not* charged in the Indictment. This evidence crept into the record through the Government's questioning *on direct* examination, *not* on cross-examination. This was timely objected to by Petitioner, but denied. This Circuit *(Fifth)*, and practically every other Court considering this issue, has ruled that the proper course is to *deny* admission of evidence of other crimes *unconnected* with the one charged since its admission is prejudicial and harmful to Petitioner. This Court in treating a similar question warns that criminal proceedings in the Federal Courts are *not* "to be conducted on the level of a game of blind man's buff".

Next, the Court below ruled that conviction by the trial court based entirely upon admissions of drug addicts, informers and confessed perjurers, *subsequent to termination of the conspiracy*, without the slightest corroboration, constituted legal basis for verdict of guilt. A decision in this Court, which seems to require corroboration to some extent, at least, looks in the opposite direction; and at least three other Circuits are squarely to the contrary.

Third, the Court below has sustained a conviction based entirely upon admissions of dope addicts and accomplices, without any proof of the existence of a conspiracy. Practically every Circuit before which this issue has presented

itself has unequivocally ruled that there must be proof, *independent* of such admissions and statements, of the existence of conspiracy.

And, last, this matter brings to focus the danger of conspiracy prosecution; namely, the unwarranted task facing the accused protecting himself from the incriminatory features of statements and testimonies by drug addicts, perjurers, accomplices, in spite of repeated warnings that this type of testimony is not only to be received with suspicion and acted upon with extreme caution, but *never* to be relied upon without some legal proof of a conspiracy.

A.

A serious aspect of this litigation lies in approval given by the Circuit Court to the illegal procedure followed by the trial judge in admitting, over Petitioner's timely objections and motions for acquittal, evidence by the Government, *on direct examination*, of offenses not charged in the Indictment for which Petitioner stood trial. This ruling permitting proof of collateral matters which had no relation to the charge of conspiracy only tended to prejudice him with the Court, to draw its mind away from the real issue, and to produce the impression that Petitioner was a wretch. Certainly, if he was guilty as charged, it was the Government's duty to establish that he was. Verdicts predicted on inferences, surmise and suspicion have never been upheld. This ruling is at marked variance with hitherto concepts of proper conduct of a criminal trial in the United States Courts, and actually invites lower courts to engage in a disturbing departure from the accepted and legal course of proceedings in criminal matters.

Although the Indictment alleges a conspiracy, and nothing more, the lower court sanctions admission of distinct and

different offenses—a motor trip by Petitioner (R. 596; 898; 958); purchase of potassium cyanide (co-conspirator Lawder, R. 898; 958, 960); scribbled notes found in possession of Lawder's wife (R. 597-607; 616-621); note found at Earl Voice's—Government witness's—house (R. 707-715); yielding to the brummagem seductions of various prostitutes; theft of checks from the Police Department, none of which were alleged in the Indictment and none related to the conspiracy charge.

Such ruling is squarely contrary to opinions out of this Court and of several Circuit Courts. A recent opinion (*Bloch v. U. S.*, 221 F. 2d 786, 790,—9 C.A.—) in disposing of an almost exact problem, states:

> "The appellant was on trial on the charge of attempting to evade or defeat the payment of his income tax. His guilt or innocence of that charge was the only issue in the case and the questions asked, above referred to, were not relevant in any way to that issue and could only serve to paint the appellant as a scoundrel * * *. The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all round, no good dissolute person, *is foreign to our system and is disapproved by this Court.*"

Justice Harlan must have had this type of case in mind when he wrote for this Court in *Boyd v. U. S.*, 142 U.S. 450, 458:

> "However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried *upon competent evidence and only for the offense charged.*" (Emphasis supplied).

Similarly, in *Simmons v. U. S.*, 75 S. Ct. 397, 401-402, this Court sternly rejected the Government's position that

extraneous evidence, consisting of gambling, drinking bouts, crap shooting; an habitue of poolrooms; violent and abusive conduct toward his (Simmon's) wife, was admissible in a criminal case. This Court specifically pointed out that these matters could *not* be injected because Simmons had *no* fair notice of these charges and such trial could *not* "be conducted on the level of a game of blind man's buff". These decisions have been cited with approval in all United States Courts. It would be difficult to find a set of facts more analogous to those existing in this cause.

Reference by the Government to such collateral matters during the course of its case *in chief*, is irrelevant, immaterial and prejudicial. To begin with, Petitioner was entitled to be tried "only for the offense charged" and failure to adhere to this principle constitutes denial of due process. Such extraneous evidence was specifically denied by Petitioner. This testimony must not be relied upon as basis in fact, especially in view of the circumstance that Petitioner was never given an opportunity to know in advance, *as was his right*, of evidence which he would be required to meet. "They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged." *Boyd v. U. S.*, 142 U.S. 450, 458.

Likewise, in very recent cases—all from the *Fifth Circuit*—notably, *Stansbury v. U. S.*, 219 F. 2d 165; *Helton v. U. S.*, 221 F. 2d 338; *Lott v. U. S.*, 218 F. 2d 338; *Railton v. U. S.*, 127 F. 2d 691, the *Court below* has unhesitatingly ruled that evidence of offenses *not* charged in the Indictment is *not* only inadmissible, *but prejudicial if admitted.*

Thus, Petitioner was denied due process.

B.

Should this Court grant review as to the above point, Petitioner intends to urge that it was error, under the circumstances, to enter a guilty verdict since the Fifth Circuit (*Stone v. U. S.*, 223 F. 2d 23, 25) admits and tacitly accepts the existence of the rule in many jurisdictions that one may *not* be convicted on the uncorroborated testimony of an accomplice. Without laboring the point at this time, the contention to be made is that, the Government's witnesses being of extremely doubtful character, and under great temptation to commit perjury, to foster messianic delusions as well as fabricate evidence, a temptation not likely to be overcome by them, are *not* to be relied upon for conviction in the United States Courts. Such testimony is not only most unsatisfactory, but when their criminal records are disclosed, it should be disregarded where *no* other evidence of guilt is presented (*Fletcher v. U. S.*, 158 F. 2d 321, D. C. Cir.). This is so because, *without corroboration*, little, if any, attention is paid to the veracity of drug addicts used as informers in narcotics cases. A scientist of long practical experience describes them as "monstrous liars". (*Menninger, The Human Mind*, 148—3d Ed.—1945). (Also, 2 *Wigmore, Evidence*, Section 500—3d Ed. 1940; 3 Id., Section 934).

The purpose of the accomplice rule is to prevent conviction based upon testimony that is likely to be perjured (3 *Wigmore, Evidence*—3d Ed.—Sec. 967). A conscientious court should apply this rule in any case where there is no supporting testimony and no other evidence of conspiracy (*Anderson v. U. S.*, 124 S.W. 2d 58, 66—6 C.A. citing *Flower v. U. S.*, 116 F. 241—5 C.A.) This is consistent with what this court has said on this subject (*Holmgren v. U. S.*, 217 U.S. 509), "* * * to require

corroborating testimony before giving credence to them". That this principle applies where the case is tried before the court, without a jury, is too plain to require citation of authority. The plainest principles of justice demand that a court hearing a case, without a jury, adhere to and apply this rule.

C.

There is the further infirmity in the ruling below, that is, affirmation of this conviction entirely on testimonies of co-conspirators and accomplices *without* any proof whatever of the conspiracy.

Disregarding what the felonious witnesses for the Government said—for admittedly, that cannot be considered against Petitioner—there is no evidence in the record that Petitioner was a party to any combination or agreement between the alleged conspirators or that he was a knowing participant in any common and unlawful design.

To state it differently, there is *no* proof in this record of any conspiracy apart from the testimonies of felons and convicts.

Differences of opinion, if such exist, between various courts of appeal as to the degree of proof of the conspiracy that is required need not be composed at this juncture, because independent evidence that Petitioner had some connection with the conspiracy or the members thereof *must* be established (*Glasser v. U. S.*, 315 U.S. 60). Obviously, mere association by Petitioner as a narcotics officer (R. 372-375; 399-401; 412, 431, 432, 562) with "characters" to make arrests and to suppress crime gives rise to *no* legitimate inference that he was a party to the conspiracy (*U. S. v. Falcone*, 311 U.S. 205, 210-211). Even if the association were so close as the Government sought

to establish, mere association is *not* conspiracy (*U. S. v. Di Re*, 332 U.S. 581). The minimum standards set forth in the last two cited cases have not here been met.

Thus, in this case the Court below has affirmed a conviction, without independent proof of the conspiracy, simply on the basis of what "criminals of the most unsavory sort" (R. 1053) and "in corrigible criminals" (R. 1052) said after the date of the acts charged. This holding is in square conflict with decisions of other Circuits which have up to now passed on that issue. This is particularly true as to the Court below *(Fifth Circuit)* which is best expressed in *Kassin v. U. S.*, 87 F. 2d 183, 184. Chief Justice Hutcheson there set out the rule applying with equal force where conspiracy is the charge, and where substantive offenses are at issue. The Fifth Circuit has re-affirmed this position on numerous occasions, as witness, *Beeler v. U. S.*, 205 F. 2d 454, 455-456; *U. S. v. Crimmins*, 123 F. 2d 271 (C.A. 2); *Paddock v. U. S.*, 79 F. 2d 872 (C.A. 9); *Wright v. U. S.*, 227 F. 2d 855 (C.A. 8); *De Luca v. U. S.*, 298 F. 412 (C.A. 5); *U. S. v. Markman*, 193 F. 2d 574 (C.A. 2). The recent case of *U. S. v. Holton*, 222 F. 2d 840 (C.A. 7) is not inappropriate.

Even if a conflict between Circuits did not exist, the result reached in this cause constitutes a serious departure from hitherto accepted principles as to necessitate review by this Court. The principle followed in the Fifth Circuit is that even circumstantial evidence *is insufficient* unless it excludes to a *moral certainty* every reasonable hypothesis of innocence *(Kassin v. U. S.*, 87 F. 2d 183, 184). While the *Second Circuit* makes no distinction between the circumstantial evidence test and the substantial evidence test, *U. S. v. Simone*, 205 F. 2d 480; *U. S. v. Spagnuolo*, 168 F. 2d 768; nevertheless, it requires independent evidence as

to existence of conspiracy *(U. S. Falcone*, 109 F. 2d 579, aff'd. 311 U.S. 205).

No logical reason exists for failure by the Court below to follow these principles stated in its previous opinions cited herein.

D.

On more than one occasion this Court has pointed out the danger implicit in conspiracy prosecutions. The fears expressed in such cases as *Krulewitch v. U. S.*, 336 U.S. 440, 445-458; *Nye & Nissen v. U. S.*, 336 U.S. 673, 625-626, are shown by the Record in this case to have been well-founded.

> " * * * conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by * * * the trial judge exercising *discretion*, all practicing lawyers know to be unmitigated fiction * * *. Few instruments of justice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice." (Mr. Justice Jackson in *Krulewitch v. U. S.*, 336 U.S. 440, 445, 453, 457).

The trial court, while it expressed no reason for ignoring these dangers, probably relied on "discretion". Under the circumstances, there was clear abuse of legal discretion in the trial court assuming that a conspiracy actually existed, and based upon that erroneous assumption, admitted evidence touching upon collateral matters. This clearly deprived Petitioner of a fair trial *(Keegan v. U. S.*, 325 U.S. 478). This is so because the burden placed upon the Government was to establish by substantial evidence that Petitioner joined the alleged conspiracy knowing the unlawful

objectives thereof with the specific intent to do and to carry out the acts alleged in the Indictment. The record, to support such conviction, "must be productive of evidence from which * * * one * * * could properly find beyond a reasonable doubt", such requisite specific knowledge and intent *(Hartzell v. U. S.*, 322 U.S. 680, 687). There must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" as is implied in an attempt to make punishable a mental state in a context of constitutionally protected freedoms *(Baumgartner v. U. S.*, 322 U.S. 665, 670). The criteria of "clear, unequivocal and convincing evidence which does not leave the issue in doubt" is "substantially identical with that required in criminal cases—proof beyond a reasonable doubt". *(Klapprott v. U. S.*, 335 U.S. 601, 612). Since, " * * * this is a criminal case, where * * * Petitioner's * * * liberty is at stake, and while natural inferences can be drawn from circumstances, such inferences cannot be substantiated for circumstances" *(Rivera v. U. S.*, 57 F. 2d 816, 822—C.A. 1).

The trial judge, for all his learning, apparently was so confused that, despite the absence of any competent evidence against Petitioner as to conspiracy, denied all motions for a judgment of acquittal (R. 265-268; 1038-1043), and sentenced Petitioner in respect to all of the counts (R. 26-27).

The trial court was similarly confused as to what evidence was admissible against Petitioner, as pointed out in some detail on pp. 16-17, this Petition, with the consequence, already delineated, that conviction of Petitioner has been sanctioned without any competent independent proof of the conspiracy.

The cases are uniform that: "The only presumptions of fact which the law recognizes are immediate inferences from facts proved" *(Manning v. Ins. Co.,* 100 U.S. 693, 698); "One presumption cannot be guilt upon another" *(Looney v. Metropolitan R. R. Co.,* 200 U.S. 480-488); "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed * * *. The record leaves the matter in the realm of speculation and conjecture. That is not enough" *(C. M. & St. P. Ry. v. Coogan,* 271 U.S. 472, 477-478); " * * * the state of mind must be exhibited in the evidence and not left to conjecture" *(Shepard v. U. S.,* 290 U.S. 96, 100).

In situations where confusion of evidence affects "The trial judge here, an experienced jurist, learned in the criminal law" (R. 1055), and where it is shown to have infected the court below, then it is submitted that this Court should allow this review to the end that the abuses prevalent in this record be rectified, and for such other relief as may be appropriate herein.

Conclusion

This case presents constitutional questions of utmost importance. Moreover, the decision below erroneously interprets and contravenes fundamental and long-established principles of Criminal Law and Procedure. This is particularly true, where, as here, guilt is predicated on, "no more than an anemic suspicion". It is respectfully submitted that Writ of Certiorari should be granted.

BERNARD A. GOLDING,
432 Niels Esperson Bldg.,
Houston 2, Texas,
Counsel for Petitioner

APPENDIX A

The Judgment

Extract from the Minutes of June 30, 1955.

SIDNEY SMITH,

No. 15421. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX B

Statutes Involved

Tit. 18, Sec. 1001

STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency or the United States *knowingly and willfully* falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Tit. 18, Sec. 494

CONTRACTORS' BONDS, BIDS, AND PUBLIC RECORDS

Whoever falsely makes, alters, forges or counterfeits any bond, bid, proposal, contract, guarantee, security, official bond public record, affidavit, or other writing for the purpose of defrauding the United States; or

Whoever utters or publishes as true or possesses *with intent* to utter or publish as true any such false, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited; or

Whoever transmits to, or presents at any office or to any officer of the United States, any such false, forged, altered or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 711.

* * * *

Tit. 26, Sec. 2553

PACKAGES (a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid

special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

(b) Exceptions in case of registered practitioners. The provisions of subsection (a) shall not apply—

(1) Prescriptions. To any person having in his or her possession any of the drugs mentioned in section 2550 (a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

(2) Dispensations direct to patients. To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away. 53 Stat. 271, amended July 1, 1944, c. 377, Sec. 2, 58 Stat. 721.

* * * *

Tit. 26, Sec. 2554

ORDER FORMS

(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Secretary.

APPENDIX C

Judgment of the Court Below Entered on June 30, 1955

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15421

SIDNEY SMITH, *Appellant*,

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

---

(June 30, 1955)

Before HUTCHESON, Chief Judge, JONES, Circuit Judge, and WRIGHT, District Judge.

WRIGHT, District Judge: This appeal concerns the sordid story of a city policeman who wanted to run with the

hare and play with the hounds. The hounds caught him. He was convicted of conspiring [1] with two incorrigible criminals to violate the Internal Revenue laws relating to narcotic drugs. In this appeal he contends that it was error to permit his co-conspirators to testify against him, that it was error to admit evidence of unrelated offenses for which he was not on trial, and that the evidence as a whole fails to support the charge against him.

The indictment charged that the appellant, with one Carl E. Lawder and one Charles Aarons, named but not indicted, entered into a conspiracy to violate various criminal statutes [2] by obtaining prescriptions for narcotic drugs from physicians under false pretenses and distributing the narcotics so obtained to the conspirators for their personal use. Lawder and Aarons, being drug addicts, used the narcotics to satisfy their addiction, while the appellant, Smith, not a drug addict, used his to purchase favors from two women of ill fame, who were addicted to the use of narcotic drugs, as well as to pay his yard boy, also a drug addict.

The evidence against Smith consisted of testimony of his co-conspirators, the two women of ill repute, the yard boy, and the owner of the house in which the appellant is alleged to have conducted his affair with one of the women. All of these witnesses are criminals of the most unsavory sort. In addition to these witnesses, the Government used the various doctors who supplied the prescriptions and the druggists who filled the prescriptions, together with certain incidental witnesses, to corroborate the testimony of the co-conspirators, Lawder and Aarons.

---

1 18 U.S.C. §371.

2 26 U.S.C. §2554 (a), 26 U.S.C. §2553, 18 U.S.C. §494, 26 U.S.C. §2554.

The record shows that on June 14, 1953 the appellant, Sidney Smith, then a policeman in the burglary and theft division of the Houston Police Department, stopped Lawder and Aarons, both known drug addicts and ex-convicts, as they were driving down a street in Houston, searched the car and found fifty dilaudid tablets which had been illegally obtained by Lawder by means of a prescription. Smith seized the tablets but did not arrest Lawder and Aarons. That afternoon Lawder and Aarons called on Smith and asked him to return ten of the fifty tablets, which Smith did. At that time Smith made it clear to Lawder and Aarons that unless they cooperated with him in obtaining dilaudid tablets, he would prefer charges against them based on the forty tablets which he retained. Smith then asked Lawder to obtain for him 200 dilaudid tablets. Lawder did so by obtaining a prescription therefor under false pretenses, representing that he was a victim of cancer. From this date, June 14, 1953, until the end of the conspiracy, August 17, 1953, Lawder purchased hundreds of tablets of dilaudid on prescriptions illegally obtained by him under false pretenses. On the various occasions when the tablets were obtained, Smith would drive Lawder to a doctor's office where he would wait in the car until Lawder returned. He would then drive Lawder to a pharmacy and again wait in the car until the tablets were obtained. The money to purchase the drugs was supplied by Smith or Aarons. The drugs were distributed to the three conspirators and used by them as above indicated.

Smith took the stand in his own defense. He admitted his association with the criminal witnesses in the case. He explained that association, however, by suggesting that in his work as a policeman, it was necessary to use informants and the informants were usually drug addicts or confirmed

criminals of one kind or another. He denied any participation in, or knowledge of, the conspiracy to obtain narcotic drugs testified to by Lawder and Aarons. He denied also illicit relations with Marguerite Fredericks and Opal Jackson although he admitted knowing them and being with them on various occasions. He also admitted driving to San Antonio with Lawder in a police car.

The Government evidence, if it is to be credited, clearly establishes beyond peradventure of doubt the guilt of the defendant as charged. Realizing that this is so, appellant spends most of his brief berating the Government's witnesses, calling them what they obviously are, and suggesting that they are not to be believed. This argument should have been made, and we presume it was, to the trial court which, sitting without a jury, found the defendant guilty. This court does not determine the credibility of witnesses or the weight of their evidence. *Caminetti v. United States*, 242 U.S. 470, 495. The trial judge here, an experienced jurist, learned in the criminal law, assayed the credibility of these witnesses and weighed their evidence. Based on that determination, he convicted the defendant and that conviction cannot be set aside by this court unless error of law, as charged by appellant, appears in allowing the co-conspirators to testify or in admitting evidence of unrelated offenses for which the appellant was not then on trial.

Appellant, citing *Fiswick v. United States*, 329 U.S. 211, and *Krulewitch v. United States*, 336 U.S. 440, apparently contends that a conspirator cannot testify against his co-conspirators, at least as to matters relating to the conspiracy. On just what basis this novel theory rests is difficult to divine. Certainly Fiswick and Krulewitch do not support it. Those cases merely restate the general principles of proof applicable to conspiracy. They stand for the principle that

statements made by a conspirator during the conspiracy, in furtherance of the conspiracy, are admissible in evidence against all conspirators. Statements or confessions of one conspirator made after the conspiracy is ended are not admissible evidence against the other conspirators.[3] But this is not to say that a conspirator is incompetent to take the stand during the trial of the conspiracy charges and testify as to the activities of the various defendants on trial during the conspiracy. See *On Lee v. United States*, 343 U.S. 747, 757. Perhaps appellant is confusing this principle with the principle that the testimony of a co-conspirator must be received with caution and should be corroborated, as here, by other evidence. *Caminetti v. United States, supra; Holmgren v. United States*, 217 U.S. 509; *Colt v. United States*, 5 Cir., 160 F. 2d 650.

Appellant's final point is it was error to admit "evidence, insinuations and innuendos of unrelated offenses for which Appellant was not on trial and which only tended to prejudice him." He complains that evidence of the purchase of potassium cyanide by Lawder during the trip which appellant and Lawder made to San Antonio is not only irrelevant but has ominous overtones prejudicial to him. The evidence concerning the purchase of potassium cyanide was introduced into the record through cross-examination of Lawder by appellant's counsel. It is true that on redirect the Government produced the potassium cyanide actually purchased. Since appellant had already opened the subject by having Lawder testify that he purchased the potassium cyanide, he obviously has no cause to complain because the Government produced the actual purchase.

[3] See also **Brown v. United States**, 150 U.S. 93; **Logan v. United States**, 144 U.S. 263; **Mora v. United States**, 5 Cir., 190 F. 2d. 749.

Appellant's complaint that testimony concerning his illicit relations with Marguerite Fredericks should not have been admitted is also without merit. Marguerite Fredericks' testimony showed that she received from Smith, in return for her affection, the dilaudid purchased by Lawder. Such evidence supported the Government's charge that Lawder, Aarons and Smith were illegally obtaining narcotic drugs.

Appellant also protests against the admission in evidence of notes in Smith's handwriting which appeared to be plans for a robbery to be performed by Smith and Lawder. These notes were introduced in evidence by the Government after Smith had testified that while he knew Lawder, the association was by no means intimate. These notes tended to rebut this testimony. If this case had been tried to a jury, the court probably would have excluded this evidence on the ground of undue prejudice. Since the case was tried to the court, the prejudicial nature of the evidence becomes less apparent. In any event, appellant did not properly object to the admission of the evidence and, consequently, this issue presents nothing for review. *On Lee v. United States, supra*; *Stewart v. United States*, 5 Cir., 131 F. 2d 624; Rule 51, Fed. R. Civ. Proc.; Wigmore on Evidence, §18 (C) (1).

AFFIRMED.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Fifth Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Bloch v. *United States*, 221 F. 2d 786	6
Bosselman v. *United States*, 239 Fed. 82	8
Boyd v. *United States*, 142 U.S. 450	6
Caminetti v. *United States*, 242 U.S. 470	8, 9
Dowling Bros. Distilling Co. v. *United States*, 153 F. 2d 353, certiorari denied, 328 U.S. 848	5
Lypp v. *United States*, 159 F. 2d 353	5
On Lee v. *United States*, 343 U.S. 747	8
Schwartz v. *United States*, 160 F. 2d 718	5
Simmons v. *United States*, 348 U.S. 397	6
Thompson v. *Carley*, 140 F. 2d 656	5
United States v. *King*, 7 How. 833	5
Wall v. *United States*, 97 F. 2d 672	5

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 376

SIDNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. C) is reported at 224 F. 2d 58.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A) was entered on June 30, 1955. A petition for rehearing was denied on August 12, 1955 (R. 1067). The petition for certiorari was filed on September 7, 1955. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred, there being no jury, in admitting evidence which tended to show the commission of offenses other than the one for which petitioner was on trial.

2. Whether testimony of accomplices and witnesses who were dope addicts or had criminal records is competent to establish the existence of an unlawful conspiracy.

STATEMENT

Petitioner was indicted for conspiracy to violate the Internal Revenue laws relating to narcotics during the period June 14, 1953, to August 17, 1953 (R. 6-19). Lawder and Aarons were named as co-conspirators, but not indicted (R. 6). Petitioner waived a jury (R. 23) and was found guilty by the court (R. 25). His conviction was sustained on appeal. (Pet. App. C).

The conspiracy alleged in the indictment consisted of petitioner's driving his co-conspirators to a doctor where one of them would obtain a prescription for narcotic drugs on the pretense of having a sick wife, and then to a druggist where the prescription would be filled with money usually furnished by petitioner. The narcotics thus obtained would be divided among the conspirators. The indictment further alleged that during the course of the conspiracy petitioner supplied portions of the drugs he obtained to certain drug addicts. (R. 6-19.)

The evidence adduced in support of the indictment may be summarized as follows:

Lawder and Aarons were the main government witnesses (R. 67-88, 130-138). They testified that petitioner, while a policeman on the Houston police force, stopped them and seized a quantity of narcotics illegally in their possession. Later he returned some of the narcotics and made it clear that, unless they cooperated with him in obtaining more, he would prefer charges against them based on the drugs he retained. These two witnesses testified to obtaining narcotics with money furnished by petitioner from druggists on prescriptions fraudulently obtained from doctors and dividing the drugs with petitioner.

One Marguerite Fredericks testified in chief (R. 193-211) and one Opal Jackson in rebuttal (R. 732-737) that petitioner had given each of them drugs in return for engaging in sexual intercourse with him. Two witnesses corroborated the testimony of Marguerite Fredericks that she had been alone with him in the bedroom of one Voice's house around July 1953 (R. 247-251, 233-235).

Petitioner's yardman also testified that petitioner had given him drugs (R. 810-816).

It was established that each of the above witnesses was either addicted to drugs, had a criminal record, or led an immoral life (R. 67, 104, 113-114, 130, 142, 164, 200, 219-220, 236, 253, 745-746, 809, 810, 821).

Petitioner denied being a participant in any conspiracy to violate narcotic laws, but admitted having dealings with the above witnesses in the course of his police work in the burglary and nar-

cotic squads (R. 354-415). He stated that he could not recall being at Voice's house after April or May of 1953 (R. 425-426, 428). He denied being a "good friend" of Lawder's (R. 469). After testifying to each time he had been with Lawder (R. 384-398), he admitted on cross-examination that he had accompanied Lawder on another occasion on a motor trip to San Antonio, but said it was for an innocent reason (R. 463-468).

Thereafter the government called Lawder back to the stand to give his account of the trip to San Antonio (R. 592-596). Lawder stated that its purpose was to buy heroin, which he did with money partially supplied by petitioner (R. 596). Under cross-examination by defense counsel, Lawder, upon insistence by counsel, testified that he and petitioner purchased some potassium cyanide while on the trip (R. 606-607). Evidence of this purchase was later introduced by the government (R. 670).

The government also introduced a note written in petitioner's handwriting on the back of a police bulletin dated June 28-29, 1953, which had been found at Voice's house (R. 707-714).

Certain scribbled notes in petitioner's handwriting, found in the possession of Lawder's wife, which Lawder stated were details of a robbery he and petitioner were to stage (R. 596-606), were introduced by the Government after petitioner had testified that his relationship with Lawder had been primarily that of policeman and informer (R. 384-398).

Evidence of a theft of checks from the police department was admitted conditionally by the court (R. 797), and later excluded in response to petitioner's motion (Supp. R. 1).

ARGUMENT

1. Petitioner claims (Pet. 16-18) that he was denied due process of law because the trial court admitted evidence which tended to disclose the commission of offenses for which he was not on trial. This contention is without merit. As the court below noted (Pet. App. C, p. 6), this case was tried before an experienced judge, sitting without a jury. It cannot lightly be presumed that the court would be misled or prejudiced by relevant evidence, even though it might be considered inadmissible in a case tried before a jury. Cf. *United States* v. *King,* 7 How. 833, 854; *Wall* v. *United States,* 97 F. 2d 672, 673-674 (C.A. 10); *Thompson* v. *Carley,* 140 F. 2d 656, 660 (C.A. 8). Even in jury cases, evidence which is both relevant and competent is not rendered inadmissible because it may disclose the commission of another offense. Reception of such evidence is within the sound discretion of the court, and subject to its instructions to the jury as to the purpose for which it was received. *Dowling Bros. Distilling Co.* v. *United States,* 153 F. 2d 353, 361 (C.A. 6), certiorari denied, 328 U.S. 848; *Lypp* v. *United States,* 159 F. 2d 353, 354-355 (C.A. 6); *Schwartz*

v. *United States,* 160 F. 2d 718, 720-721 (C.A. 9).[1]

The evidence in this case to which petitioner objects (Pet. 17) which was in fact admitted was all relevant to the proof of the conspiracy for which he was on trial, and most of it was adduced in rebuttal. Thus, the evidence as to the motor trip with Lawder to San Antonio was admissible to impeach petitioner's testimony (R. 384-389) as to the limited extent of his association with Lawder, a co-conspirator; the purchase of potasium cyanide was first introduced into the record on cross examination of Lawder by petitioner's counsel (R. 606-607; see Pet. App. C, p. 5); the notes in petitioner's handwriting found in the possession of Lawder's wife were admissible further to impeach petitioner's testimony as to the extent of his relationship with co-conspirator Lawder and to corroborate Lawder's testimony; the note on the dated police bulletin found at Voice's house was admissible to refute petitioner's testimony that he had not been there during the period of the conspiracy charged (R. 425, 426, 428), and to corroborate the testimony of Government witnesses to the contrary (R. 202-204, 234, 249-250); the testimony of the prostitutes that petitioner had given them narcotics in exchange for favors, as the court below noted, tended to support the Govern-

[1] The cases cited by petitioner (Pet. 17-18) are not in conflict with these decisions. *Bloch* v. *United States,* 221 F. 2d 786 (C.A. 9); *Boyd* v. *United States,* 142 U.S. 450; and the Fifth Circuit cases, all jury cases, are examples of the application of the general rule to the facts of those cases. *Simmons* v. *United States,* 348 U.S. 397, is not pertinent.

ment's charge that petitioner and others were illegally obtaining such narcotics (see Pet. App. C, p. 6); finally, the court excluded on motion of petitioner the evidence of the theft of checks (Supp. R. 1).

Under the circumstances, the court below correctly rejected petitioner's contention that the trial court erred in admitting this evidence.

2. Petitioner also argues that conviction cannot be had in this case because establishment of the conspiracy was on the uncorroborated evidence of accomplices (Pet. 19-20). In other facets of the same argument he contends that there was no competent evidence of conspiracy since the accomplices were dope addicts and criminals and not to be believed (Pet. 20-22), or that there was no evidence of conspiracy at all (Pet. 22-24).

Petitioner's suggestion that there was no evidence of the conspiracy charged ignores the record. As the court below stated: "The Government evidence, if it is to be credited, clearly established beyond peradventure of doubt the guilt of the defendant as charged" (Pet. App. C, p. 4). The issue which petitioner raises is, therefore, solely one of credibility. While the testimony of accomplices, informers, false friends, and the like should be received with caution, as it undoubtedly was by the experienced trial judge, the admission of such evidence is not ground for reversal, especially where, as here, the case is tried to the court sitting without a jury. *On Lee* v. *United States,* 343 U.S. 747, 757; *Caminetti* v. *United States,* 242 U.S. 470,

495; *Bosselman* v. *United States,* 239 Fed. 82, 85 (C.A. 2).

Moreover, the testimony was corroborated by other testimony adduced in the case. Three witnesses testified that they were given drugs by petitioner during the time alleged in the indictment. This supported the accomplices' testimony that they and petitioner were engaged in a scheme to obtain them. There was also other testimony by witnesses whose character was not impeached, including various druggists and doctors, corroborating the testimony of the accomplices as to the purchase of narcotics (R. 44, 46, 47-48, 52-58, 170-177, 179-186, 186-193, 226-232, 241-247). The fact that these witnesses did not identify petitioner (see Pet. 5-8) is not strange since the testimony was that he remained in the car and did not himself obtain either the prescriptions or the drugs.

The trial judge, whom the court of appeals described as "an experienced jurist, learned in the criminal law" (Pet. App. C, p. 4), assayed the credibility of these witnesses and weighed their testimony and petitioner's in the light of the corroborating evidence which was adduced. The court of appeals unanimously affirmed the judgment of conviction. It is because the triers of the facts have the advantage of seeing and hearing the witnesses and of observing their demeanor on the witness stand that appellate courts wisely leave to their judgment issues of credibility. "This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was

substantial testimony tending to support" the judgment of the trial court. *Caminetti* v. *United States*, 242 U.S. 470, 495.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

OCTOBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 983907 497